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SUPREME COURT, U.S.

No. 07-1233

IN THE

Supreme Court of the United States

STEPHEN BARRETT, M.D.,

Petitioner,

v.

TEDD KOREN, D.C. and
KOREN PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA OFFICE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether Petitioner's failure to prove the defamatory character of the communications in question precludes jurisdiction for an examination of whether actual malice can be inferred from Respondent's failure to print a retraction?

(2) Whether the trial court erred in determining that Petitioner, a public figure plaintiff, failed to prove by clear and convincing evidence that Respondents published the alleged defamatory statements with actual malice?

RULE 29.6 STATEMENT

Respondents, Tedd Koren, D.C. and Koren Publications, Inc., have no parent corporations, and no publicly held company owns 10% or more of the stock of either of the Respondents.

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STATEMENT

The underlying action from which the instant Petition for a Writ of Certiorari is filed is a defamation action arising out of alleged injuries sustained by Petitioner Stephen Barrett, M.D., (hereinafter referred to as Petitioner) as a result of alleged statements made by one of the Respondents, Koren Publications. In his Complaint, Petitioner alleged that in August, 2001, Respondents intentionally, knowingly and falsely published communications which were defamatory and clearly and explicitly referred to Petitioner. Petitioner's claims of defamation focused on three alleged statements contained in an article circulated among various internet web sites. The first alleged defamatory statement that Petitioner asserts was made by Respondents was use of the term "de-licensed" physician when describing Petitioner. The second alleged defamatory statement was that Petitioner was "in trouble" in connection with a lawsuit that had been filed against him by a third party. The third and final alleged defamatory statement was the reference to Petitioner as a "quack-pot".

Both prior to and at the time of trial, Petitioner stipulated that he was a public figure. Respondents have strenuously denied the allegations contained in the Complaint, including that they published material that was defamatory to Petitioner and did so in an intentional, knowing, deliberate, reckless, willful, wanton, egregious or outrageous manner.

On October 13, 2005, at the close of evidence presented by Petitioner in a jury trial, Respondents

presented a Motion for Nonsuit, which was granted by the trial judge, the Honorable Brian Johnson. At the same time that the Motion for Nonsuit was granted, Judge Johnson denied Petitioner's Motion for Directed Verdict whereupon Petitioner made an oral motion for reconsideration, which Judge Johnson also denied.

On October 21, 2005, Petitioner filed a Motion for Post Trial Relief, and argument was held on March 29, 2006. By Order of Court dated March 31, 2006, the trial court denied Petitioner's Post Trial Motion. A Praecipe for Entry of Judgment in favor of Defendants (Respondents) and against Plaintiff (Petitioner) in the amount of zero dollars was entered by Respondent on April 7, 2006, and on April 12, 2006, Petitioner filed an appeal from judgment in this matter to the Superior Court of Pennsylvania, Docket Number 1035 EDA 2006.

On June 11, 2008, in its Memorandum, the Superior Court affirmed the Order entered by Judge Johnson. The Superior Court determined that the trial court's grant of a non-suit was proper because the evidence, even when viewed in a light most favorable to Petitioner, failed to establish the elements of defamation, including that the alleged defamatory statements were made with actual malice.

On January 2, 2008, the Supreme Court of Pennsylvania, Middle District, denied Petitioner's Petition for Allowance of Appeal.

DISCUSSION

I. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S JURISPRUDENCE

A. Pennsylvania Courts applied established law to both federal and state questions when resolving the issue of whether the statements themselves were capable of defamatory meaning.

The Court, not the jury, must first make the determination of whether a statement is capable of a defamatory meaning. *Kernick v. Dardanell Press*, 428 Pa. 288, 294 (1967). If the court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial. *Thomas Merton Center v. Rockwell Int. Corp.*, 497 Pa. 460 (1981); *see also Kernick v. Dardanell Press*, 428 Pa. 288, *supra.* ("It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo. **If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo, the case should not be sent to a jury.** (Emphasis added.) (*Quoting Sarkees v. Warner-West Corp.*, 349 Pa. 365 (1944).

Petitioner has the burden of proving the defamatory character of the communications. 42 Pa. C.S. § 8343(a); *see also Tucker v. Phila. Daily News*, 577 Pa. 598, 614 (2001).

The Pennsylvania Superior Court's holding that the term "de-licensed" was not actionable, even when viewed in the context of other alleged defamatory statements, was consistent with its own precedent and well established standards set by this Court.

Petitioner alleged that Respondents defamed him by stating in a website publication that Petitioner was a "de-licensed" physician. However, the term "de-licensed" can be interpreted in many ways. Some Courts refer to the term de-licensed as a voluntary action to have one's license inactivated. *Internationally Hott II v. City of Elizabeth*, 1997 U.S. Dist. LEXIS 22869 (D.N.J., 1997) and *Ackley v. Wyeth Laboratories, Inc.*, 919 F.2d 397 (6th Cir. 1990). Other courts have referred to the term as one of temporary suspension. *ANA Small Business Investments, Inc. v. Small Business Administration*, 391 F.2d 739 (9th Cir. 1968). The use of the term in these cases is in accord with the action the Petitioner took in voluntarily suspending his license. Therefore, reasonable people can certainly conclude that the Petitioner was in fact de-licensed and Petitioner was correct in saying that he was de-licensed. Furthermore, as the court concluded in *Bogash v. Elkins*, 405 Pa. 437, 176 A2d 677 (Pa. 1962), statements which represent differences of opinion or are annoying or embarrassing are not, without more, libelous.

The Superior Court properly determined that

> even accepting Appellant's position that Appellee understood the word 'de-licensed' to mean an involuntary loss of license, the trial court properly determined that 'de-licensed',

> which the parties stipulated is a made up word, was adopted by Appellant from the website of another author, that he had his own understanding of the word, and that he had no reason to believe this information was false.

Barrett v. Koren, (Pa. Super. 1035 E.D.A. 2006 at pp. 9-10.) This sound reasoning is neither controverted by another intermediate appellate court opinion, or the United States Supreme Court on the same legal question. This issue, as determined by the Superior Court, is not one of first impression or of substantial public importance as to require resolution, and therefore, the Petition for Writ of Certiorari should be denied.

B. Pennsylvania Courts applied established law to both federal and state questions when resolving the issue of whether the Petitioner established clear and convincing evidence of actual malice.

Petitioner relies upon Judge Bowes concurring and dissenting opinion, appended to the Pennsylvania Superior Court's Opinion, that distinguishes information placed on a website from information placed in a newspaper, when coming to the conclusion that Respondents' failure to retract the term "de-licensed" could have allowed a jury to infer and conclude that Respondents acted with actual malice. The majority opinion of the Superior Court, in its Memorandum, properly applied the analysis and reasoning of seminal cases on this very issue and came to the appropriate

conclusion that actual malice could not be inferred from Respondents' failure to retract the term "de-licensed" from its internet publication.

Here, Petitioner concedes he is a public figure. Petitioner has often referred to himself as a public figure and various courts have treated him as such. Barrett has assumed the role as a consumer advocate in regard to various issues in the medical field. (R.87a) He maintains various web sites from which he expounds his so called knowledge. These sites have thousands of hits a year. (R.88a)

"Public figures" are allowed recovery for defamation of character only upon proof of "actual malice" because they usually enjoy such easy access to the media that they readily have the opportunity to defend themselves to public scrutiny and to the consequent increased risk of being subjected to defamation. *Curly v. Lisman*, 19 Pa. D&C 3d 520, 524 (1981).

"Actual malice" is a fault standard, predicated on the need to protect the public discourse under the First Amendment form the chill that might be fostered by less vigilant limitations on defamation brought by public figures. *Id.*; *see also Weaver v. Lancaster Newspaper, Inc.*, 875 A.2d 1093 (Pa. Super. 2005); *see also Sprague v. Walter*, 441 Pa. Super. 1, 656 A.2d 890, 904 (Pa. Super. 1995). Furthermore, "actual malice" must be proven applying a **subjective standard**, not an objective standard "by evidence that **the defendant *in fact* entertained serious doubts as to the truth of his publication.**" *Lewis v. Phila. Newspapers, Inc.*, (Pa. Super. 2003), 833 A.2d 185, 192 (2003), *supra* (*Curran v. Phila. Newspapers, Inc.*, 546 A.2d 639, 376 Pa. Super. 508 (1988).

While actual malice may be shown by circumstantial evidence of events surrounding the publication of the offending statement, the circumstantial evidence must tend to establish fabrication, or at least that the publisher had "obvious reasons to doubt the veracity of the informant or the veracity of the reports." *Sprague v. Walter*, 656 A.2d 890,904 (Pa. Super 1995) (citing *Herbert v. Lando*, 441 U.S. 153, 156-157 (99 S. Ct. 1635, 60 L. Ed. 2d 115) (1979)). "Although lack of truthfulness in a statement is a prerequisite to liability [in a libel action], mere falsity, is generally not sufficient to establish actual malice." *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1091 (3d Cir. 1985). Similarly, evidence of ill will or a defendant's desire to harm the Plaintiff's reputation, without more, does not establish actual malice. *Lewis v. Phila. Newspapers, Inc.*, 833 A.2d, *supra; see also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666-667 (105 L. Ed. 2d 562, 109 S. Ct. 2678) (1989) ("[T]he actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term . . . [Paras.] the phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will.")

It is respectfully submitted that Judge Bowes' Concurring and Dissenting Opinion, which distinguishes the internet from a print newspaper when analyzing whether the failure to retract a defamatory statement may be adequate evidence of actual malice, is a distinction without a difference. The standards for determining whether the failure to retract an alleged defamatory statement is adequate evidence of actual malice for constitutional purposes should not be treated differently, depending upon whether the statement is contained in print or on the internet.

The Pennsylvania Superior Court, in its Memorandum, properly applied the analysis and holding in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1984), that a defendant's failure to retract a defamatory statement complained of is not adequate evidence of actual malice for constitutional purposes. The Superior Court went on to examine the rationale used by the trial court judge, Judge Johnson, in determining this issue:

> [W]hen you talk about what he [Respondent] believed, just because Dr. Barrett asked for the retraction, that didn't necessarily mean that Dr. Koren agreed with him.
>
> And again, we go back to the measure that it is not what a reasonable person would do, it is what Koren actually believed and he still believed those things were true.

(N.T., October 13, 2005, pp. 23-24). Certainly, the request from Petitioner to retract the alleged defamatory statement was nothing more than Petitioner's opinion that he was not "de-licensed". No more proof or evidence, other than Petitioner's request, was offered that would have given Respondent reason to entertain serious doubts about the truth of the statement. The Pennsylvania Trial Court and later the Pennsylvania Superior Court properly determined that such evidence was not "clear and convincing", the necessary finding to establish actual malice on the part of Respondent. Its holding on this issue is consistent with other Appellate decisions, and the opinions of the United States Supreme Court.

II. REVIEW IS ALSO NOT MERITED ON ANY OTHER BASIS

Petitioner offers no reason for this Court to accept review other than a supposed incompatibility of *New York Times v. Sullivan*, a pre-internet case, with the present set of facts in the case *sub judice*. Petitioner does not assert that the decision below conflicts with any decision by a United States Court of Appeals or the highest court of another state. Petitioner does not claim that the Pennsylvania Courts have misunderstood the actual malice standard recognized by this Court, nor does he indicate why it is an important question of federal law that has not been, but should be, settled by this Court. This Court may not have jurisdiction to review the question presented; however, to the extent that jurisdiction exists, there are no compelling reasons to exercise it.[1]

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1. Denial of the Petition for Writ of Certiorari would be consistent with this Court's decision in *Tucker v. Philadelphia Daily News*, 172 S. Ct. 154 (October 2, 2006).

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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